IN THE SUPREME COURT OF THE UNITED STATES

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MICHAEL D. CRAWFORD, :

Petitioner :

v. : No. 02-9410

WASHINGTON. :

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Washington, D.C.

Monday, November 10, 2003

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:56 a.m.

APPEARANCES:

JEFFREY L. FISHER, ESQ., Seattle, Washington; on behalf of the Petitioner.

MICHAEL R. DREEBEN, ESQ., Deputy Solicitor General, Department of Justice, Washington, D.C.; on behalf of the United States, as amicus curiae.

STEVEN C. SHERMAN, ESQ., Senior Deputy Prosecuting Attorney, Olympia, Washington; on behalf of the Respondent.

C O N T E N T S

P R O C E E D I N G S

(10:56 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in No. 02-9410, Michael D. Crawford v. Washington.

Mr. Fisher.

ORAL ARGUMENT OF JEFFREY L. FISHER

ON BEHALF OF THE PETITIONER

MR. FISHER: Thank you, Mr. Chief Justice, and may it please the Court:

The Confrontation Clause prohibited the admission of the accomplice's custodial statement here for two reasons: first, because its interlocking nature did not establish its reliability under this Court's Roberts jurisprudence; and second, and more fundamentally, because the accomplice's custodial statement amounted to out-of-court testimony that was never submitted to cross-examination, in violation of the traditional understanding of the right to confrontation.

QUESTION: When you say out-of-court testimony, Mr. Fisher, what do you mean by the word testimony?

MR. FISHER: What I mean, Mr. Chief Justice, is someone giving a statement out of court that is the functional equivalent of what they would do in court, which is to say they're giving the authorities a statement that is describing an event in a way that they understand

is going to be used in a criminal investigation.

QUESTION: So it may -- it -- the -- it applies to the -- if it's made to the authorities but not to a third person?

MR. FISHER: Ordinarily that's the -- that would be the dividing line.

QUESTION: Why is that?

MR. FISHER: Well, because the Confrontation Clause, to go back to the text and to start with the text, talks about being a witness against somebody. And the -- and the common understanding of that term is to give a statement that you understand is going to be used in a criminal investigation, and when you're giving a statement to the authorities, here a custodial statement to the police, that's a different situation than the ordinary, everyday occurrence of speaking to a friend or a colleague or something.

QUESTION: But your ultimate criterion is was it made with the understanding that it would or probably be used for prosecutorial purposes.

MR. FISHER: That's the way I read the -- the term witness against in the Constitution. It's the gateway to the Confrontation Clause. Yes, Justice Souter.

QUESTION: So in an auto accident, a private investigator -- it's a serious accident. Private

investigators for both of the parties come out and make -- and make notes of what the witnesses said. Is -- is that testimonial?

MR. FISHER: The private --

QUESTION: It's a later criminal proceeding and it's --

MR. FISHER: Well, I mean, I -- I think that that's the kind of a statement that ordinarily is not going to be testimonial. You know, an auto accident -- I take it you're -- you're talking about an auto accident in terms of a criminal case. But --

QUESTION: Well, it's -- it's an auto accident and insurance investigators are all over the scene when it later turns into a criminal case.

MR. FISHER: I mean, that's the kind of a situation that there could be a difficult question in something like that, but I think that is likely not to be testimonial.

QUESTION: Well, it's --

QUESTION: What about if the -- what about a police officer who does the same thing?

MR. FISHER: I think the police officer certainly tips the balance and certainly when somebody is talking to a police officer, that's the kind of a statement they understand is going to be used in court.

QUESTION: Well, if -- if we're going to change, as you suggest in your brief, to using this term testimonial, it certainly does not bring any great certainty, does it, if you say something tips the balance one way or another? Obviously, you're going to get a lot of close cases.

MR. FISHER: Well, I understand, Mr. Chief Justice, there are going to be some close cases out on the margins, and I acknowledge that. But what the testimonial approach does is it covers the core cases, the ones that the Confrontation Clause has always been concerned with.

And really, it's not so much a new test. What -- what the testimonial approach does is really sum up what this Court itself did in interpreting the common law and bringing that under the umbrella of the Sixth Amendment starting in Kirby and Mattox, the Court's earliest decisions on the Confrontation Clause, really all the way up through Douglas in the 1960's where actually in that very opinion the Court uses the term to describe a custodial confession -- the Court uses the term the equivalent of testimony. And so that's the kind of a situation we're talking about to --

QUESTION: When you --

QUESTION: But you -- you -- your proposal would effect a significant change in doctrine, I guess, from the

Roberts case, and I think even under your proposal certain testimonial statements would be admissible against the defendant, for instance, where the defendant has contributed to making the witness unavailable and so forth.

MR. FISHER: Well, the --

QUESTION: I mean, you -- you would still have some testimonial statements in there.

Tell me which of our cases, since the Roberts decision, would have come out differently under your proposed approach.

MR. FISHER: I don't think, Your Honor, any cases since Roberts.

QUESTION: No case.

MR. FISHER: Nor any case before Roberts.

QUESTION: Then why change?

MR. FISHER: Because the lower courts aren't getting it right, Chief Justice Rehnquist, and I think that the problem is, is that the Roberts approach sets up a framework that is both unworkable in practice and is leading to consistently anomalous results. And I think it's --

QUESTION: Idaho would have -- v. Wright would have come out the same way because the doctor who took the statements of the child was acting at the request of the

police?

MR. FISHER: That's how I understand the facts of the case, Justice Kennedy. The victim was -- was in police custody at the time of the examination, and it was in coordination with the police. So, yes, Idaho v. Wright, as well as this Court's other cases, would come out.

But it's important, you know, to go back to the question and say, you know, why change for Roberts if we've gotten to the right places in -- in our cases. And the answer is, you know, certainly this Court may never have to change from Roberts, but simply understanding the way that Roberts is working in the lower courts I believe should cause this -- cause the Court great concern. The --

QUESTION: But isn't -- isn't that our -- our function in part? We occasionally take cases from lower courts to straighten out misconceptions. Presumably that's how these things get worked out.

MR. FISHER: That's correct, Justice O'Connor, but, you know, I would submit that you're going to have to practically fill your docket with Confrontation Clause cases doing error correction in order to come out correct in all these cases.

QUESTION: Well, we've -- but we've had Roberts

for 23 years, and we certainly haven't filled our docket with Confrontation Clause cases.

MR. FISHER: Well, that's right. And that's -- and -- and what's happened, because you haven't done that, is the lower courts are reaching some very, very bad results. I was responding to Justice O'Connor's question about why change from Roberts if we're getting to the right solution, and reason is because the way that the test is framed, it just simply is unworkable in the lower courts. As we cited in our brief, there are -- we gathered 20 factors that lower courts are using for indicia of reliability. We could have listed 40 or 50.

The United States is asking you, as well as the State, to stick with this -- stick with this reliability approach for all of its faults. And you know, the -- the ironic thing with that kind of a -- of -- of a position is the more testimonial the statement is, the more reliable it is, and in turn --

QUESTION: Before you give the reasons, I -- I want to go back to what you said. You say the test should be functional equivalent of testimony. The functional equivalent is a little vague, and the law professors in their amicus brief suggest that the question should be, would a reasonable person in the position of declarant anticipate that the statement would likely be used for

evidentiary purposes? Would you accept that as a -- a -- would you adopt that phrasing of the question, or do you have a different phrasing, or do you think if we did follow your approach, the opinion should simply say functional equivalent?

MR. FISHER: Well, first of all, Justice Breyer, you don't have to get too far into that in this case because, of course --

QUESTION: No, no. But I mean it's true that -- I realize that, but -- but perhaps we could do a little bit better than say just testimonial. If -- if we accepted your approach --

MR. FISHER: I think --

QUESTION: -- so I'm -- I'm -- I want your opinion on that. I mean, there -- we have several briefs here. We have variations on the theme, and I want to know which variation you think is the best or which is the worst. I read you one of them.

MR. FISHER: I think I agree with the starting point of the functional equivalent of testimony. And then I think that the law professors' test, the reasonable expectation, is a good test, and I would -- I would embellish that by saying that I think that what we have is 99 cases out of 100 that's going to be the situation that I -- I believe the Chief Justice brought up, which is the

-- somebody speaking to the authorities in the course of the investigation of a crime, somebody giving a statement to the authorities or directing one to them.

QUESTION: Would there be anything that fit in your category where the person to whom the statement is made is not an officer, either a police officer or prosecutor?

MR. FISHER: I think there may be, and the reason -- I think there may be a -- a rare, rare case, Justice Ginsburg, in a scenario -- you know, come up with hypotheticals. One possible scenario might be somebody giving a statement to their friend and directing them to tell the police. So, you know, simply using an intermediary where we know the statement is going to the police, but --

QUESTION: Why -- why should it depend on the intent of the declarant? I -- why is that -- why does that make the declarant a witness within the meaning of the Confrontation Clause? I mean, suppose -- suppose the police get -- get the statement from the declarant surreptitiously. They do not let -- let him know that they are, in fact, the police. That -- that would disqualify it under the law professors' test from being testimony?

MR. FISHER: Well, in that --

QUESTION: Because he would not know that this was going to be used in court.

MR. FISHER: Well, I mean, I think that's a situation -- you know, and this is where the definitional problem gets difficult. I mean, because the other part of the Confrontation Clause is a limitation on State power, and it says -- you know, going all the way Blackstone, it's a limitation on the State molding statements that it's going to use later in a criminal investigation. So if that kind of a situation were present where somebody is molding somebody's statement, I think that might be something the Confrontation Clause is concerned with as well.

And that goes back to Justice Ginsburg's question to say that, yes, there may be, you know, difficult cases -- difficult hypothetical out in the margin, but what we have here is a test that covers what are the time-and-again cases that are coming before this Court and coming before the lower courts.

QUESTION: Well, but --

QUESTION: Are you -- just -- just with the dialogue with Justice Scalia, because I'm interested in the same problem, is it the intent of the speaker or the intent of the person taking the statement that would be -- be more relevant in your view?

MR. FISHER: Well, certainly I -- I -- you know, you don't have to decide that question in this case, but I think that if either one of them --

QUESTION: Well, of course -- of course, we do. I mean, I -- I really object to saying, you know, just -- just don't worry about it. We'll worry about it later. I mean, if there are real problems that come up later, I'm not going to buy your -- your retreat from Roberts.

MR. FISHER: I see, Your Honor. I think that proper -- the proper test would be if -- if one of the two people is so -- you know, is doing something with the purpose of understanding it's going to be used in a criminal case, then we have a testimonial situation. I think you -- this Court could say that, but it -- you have to look back --

QUESTION: You mean even the speaker or the person taking the statement. Is that what you're saying? I don't understand your response.

MR. FISHER: I think certainly the speaker and I think there may be situations -- and this is -- this is something the Court can deal with about when this -- about when the -- when the governmental officer is the only one and -- and is under such a circumstance that the governmental officer is molding the statement in such a way and molding what somebody is going to say --

QUESTION: Well, you know, the concern we ought to have with your approach is we're going to get into some very tricky questions if we go your route in deciding what's testimonial, and why buy a pig in a poke, in effect?

MR. FISHER: Well, the first reason is because, as I said, if you have difficult cases out on the margin, I submit to the Court the Constitution could tolerate that.

QUESTION: Yes, but I think the professors there are thinking that isn't difficult. I think they're thinking it is the question of whether a reasonable person in the declarant's position would think it was likely that this was going to be used in testimony because if you look to the position of the police, you will suddenly find that tape recorded informant testimony of an ongoing conspiracy, while they're planning to rob the bank, and suddenly is kept out of court. And there is no reason. We wouldn't keep it out of court today. It would be -- come in under the co-conspirator rule. So I think that they wrote these words in this brief thinking about it, and now if we're suddenly going to go and -- and open this all up to a whole bunch of other things, I'd be a little nervous about it too.

MR. FISHER: No, I'm sorry, Mr. -- Justice

Breyer. I may have misunderstood partially the suggestion -- the hypothetical that I was getting. I think you're correct that the traditional kind of co-conspirator statements under that kind of a situation would come in under either approach. What I understood the hypothetical to be was a situation where somebody, after a conspiracy is done, is doing --

QUESTION: It's your view that a co-conspirator statement is not testimonial then?

MR. FISHER: I think that's the ordinary course of events. Yes, Justice Ginsburg.

QUESTION: Well, why is that if it meets the test of a statement made to the police?

MR. FISHER: Well, if there's an undercover officer present, it meets -- it meets the -- the -- you know, the test of a statement made to the police. But then I think this is where the law professors have it right, and this is where I'm agreeing with Justice Breyer.

QUESTION: Not -- you're right. It's not automatically. Under the rule today, if it's a co-conspirator statement, right in the police station, because it's an ongoing coverup conspiracy, I guess it would come in. But I think under the new rule, if in fact everybody in that room knows that it is likely to be used as a substitute for testimonial use at trial, it would not

come in. I think that's the point of the change.

MR. FISHER: I think that's correct.

QUESTION: And -- and --

QUESTION: Well, how -- how about a wire tap? You've got a wire tap going, and you hear co-conspirators on -- on the other end of the wire. Is that testimonial or not?

MR. FISHER: I think that's the traditional kind of co-conspirator statement that is not covered by the testimonial approach. And -- and I think --

QUESTION: And under your approach it would come in without difficulty. It would not be testimonial. Is that what you're saying?

MR. FISHER: Without difficulty as to the Confrontation Clause, yes, Justice O'Connor.

And I think it's important when we look at these hypotheticals to compare what we have on the other side when you look at the Roberts approach. Under the Roberts approach, no matter how much -- you know, if somebody gives an out-of-court affidavit, if somebody speaks ex parte to a grand jury, even if a witness takes the stand in the middle of a criminal trial -- in -- in a criminal trial and puts blame directly on the defendant, and then, for example, were to die or suddenly go missing, under Roberts you have the situation where the trial judge

doesn't strike the testimony, doesn't disallow it, but looks to its reliability.

And the odd thing -- and this is what I was getting to earlier. Compared to what the State and the Solicitor General are proposing to you today, the odd thing is the more testimonial it is, the more it comes under the core concern of the Confrontation Clause that started in Raleigh's trial and has moved all the way forward -- the more testimonial it is, the more likely it's pass -- it is to pass the Roberts test.

QUESTION: Well, let's look at this very case and tell me whether the result is any different at the end of the day under Roberts versus your test.

MR. FISHER: I think the answer is absolutely not, Justice O'Connor. Under this Court's Wright opinion -- you know, the rationale for the lower court was interlocking confessions. Under this Court's Roberts -- I'm sorry. Under this Court's opinion in Wright, it is only the inherent indicia of reliability surrounding a statement not other evidence at trial that a judge can look to. So --

QUESTION: And therefore? I mean, relate it to this case, if you would. Tell me whether the result would differ under your proposal and under Roberts in this very case. Why don't you focus on the statement and tell us

why it would or would not be different?

MR. FISHER: It doesn't matter in this case, Justice O'Connor, for two reasons.

First of all, because under Wright, you cannot look to the defendant's confession in order to assess the reliability of Sylvia's statement, and that's what the Washington Supreme Court did.

The second reason is even if you could look to that -- to the substantive evidence at trial, several other indicia showed that the statement here was unreliable. The -- the witness was drunk. She said she'd been in shock during the events. She gave two inconsistent statements within a 4-hour span. She was in police custody after being told that it depended what she told the officers as to whether or not she'd be allow to leave. So there are several, several reasons to believe that the statement here --

QUESTION: Is it --

MR. FISHER: -- you know, is excludable under both tests.

QUESTION: Why is it excludable under your test?

MR. FISHER: Well, under the testimonial approach, Mr. Chief Justice?

QUESTION: Yes.

MR. FISHER: For the simple reason that she was

in custody giving a statement, giving a confession or a -- or a custodial examination to police officers knowing it was going to be used in the criminal investigation. That's the traditional -- it is -- is the most common -- it is the core concern of the Confrontation Clause.

QUESTION: How --

MR. FISHER: It brings us all the way back to Raleigh's trial.

QUESTION: How about a statement like in Mancusi or one of those cases where the witness is given prior recorded testimony? There's been an opportunity to cross-examine. The witness is presently dead or unavailable. Does that come in under your system?

MR. FISHER: Yes, Mr. Chief Justice. Mancusi comes out exactly the same way, and here's why. And this shows why my test -- why the testimonial approach is actually quite narrow. All the testimonial approach says is the witness has to have had a chance to cross-examine the witness.

QUESTION: The defendant.

MR. FISHER: If, when it comes time for trial -- I'm sorry?

QUESTION: The defendant.

MR. FISHER: I'm sorry. The defendant has to have had a chance to cross-examine the witness. If trial

rolls around and the witness is unavailable, through no fault of the parties, and there's been adequate cross-examination, as in Mancusi and actually as in Roberts itself -- and -- and I actually --

QUESTION: Cross-examination by the defendant, not by somebody else.

MR. FISHER: Right. The statement needs to be given in the defendant's presence with the defendant himself having the opportunity to cross-examine.

QUESTION: Would -- would your approach overrule Inadi?

MR. FISHER: No, I don't believe it does.

QUESTION: So you wouldn't have to say -- show that a particular declarant was unavailable.

MR. FISHER: You would have to show that a particular declarant is unavailable --

QUESTION: Well, then --

MR. FISHER: -- if it were a testimonial statement. What -- what --

QUESTION: Well, then how about a spontaneous declaration?

MR. FISHER: Well, that's the kind of a thing that's traditional hearsay. It's outside of the scope of the phrase witness against. It's outside of the scope of the testimonial approach.

QUESTION: So it would come in under your system?

MR. FISHER: An excited utterance comes out the same way under --

QUESTION: Without -- without having to show unavailability.

MR. FISHER: Right. It's just purely a hearsay question, Justice -- Chief Justice Rehnquist.

QUESTION: Because you say that's outside of the Confrontation Clause entirely, not lumping all of hearsay. I thought your whole point is we don't want to lump all of hearsay under the Confrontation Clause.

MR. FISHER: That's exactly right. I'm sorry, Justice --

QUESTION: But there's one aspect of this case that before your time is up I hope you can enlighten me on. The reason that this witness is unavailable is that the defendant has exercised his right to prevent his wife from testifying against him. Is that correct?

MR. FISHER: It's -- it's close, Justice Ginsburg. Washington law renders as a default rule that a spouse is unavailable to testify against another spouse. Mr. Crawford here declined to waive that privilege.

QUESTION: All right. But because he could have not asserted that or not waived it, why doesn't that carry

over also? Why doesn't her immunity -- his control of whether she can speak -- why doesn't that control as well the use of the substitute for her testimony? If -- if there is such a privilege, why doesn't it cover both her actual testimony in court and the substitute for that testimony?

MR. FISHER: Well, I mean, I think you're asking me as a Federal issue. As -- you know, as a State law issue, Washington State law has decided that the second -- that the out-of-court statement can come in. As a Federal --

QUESTION: I just don't understand the logic of it.

MR. FISHER: As a -- well, the reason -- you don't understand the logic of the State law rule?

QUESTION: The State -- yes, to say that he can keep her off the stand, but he can't prevent a substitute for -- for that statement --

MR. FISHER: I agree, Justice Ginsburg. It is -- it is a somewhat odd State law rule. There's a -- there's a case called State v. Burden that the Washington Supreme Court held that the marital privilege applies just to the -- just to actually facing your spouse on the stand in the course of a trial because it -- you know, it helps your spouse avoid the possibility of perjury and things

like that. And it said it doesn't apply to out-of-court statements. I think you could make a very strong argument that it ought to apply to both, but as a State law matter, the Washington Supreme Court has said only in-court testimony.

Unless the Court has any further questions, I'll reserve the remainder of my time.

QUESTION: Very well, Mr. Fisher.

Mr. Dreeben, we'll hear from you.

ORAL ARGUMENT OF MICHAEL R. DREEBEN

ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE

MR. DREEBEN: Mr. Chief Justice, and may it please the Court:

If the Court reaches the second question presented in this case, the United States submits that the Confrontation Clause should be properly construed to be limited to testimonial statements and their functional equivalent, but it should not be an absolute bar against the admissibility of that kind of statement.

QUESTION: Well, you kind of want it both ways. It's kind of an odd position. Has the Government taken a different position on the testimonial aspect in the past?

MR. DREEBEN: No, Justice O'Connor. We took the same position with respect to the limitation of the clause to testimonial statements in White v. Illinois, and this

Court rejected that submission by a 7 to 2 vote. We renewed it in this case in light of the Court's grant of certiorari on the second question presented in which the petitioner's position is that this Court has too broadly construed the Confrontation Clause, but within its compass, it should be given an absolute prohibition.

QUESTION: I don't -- I don't understand. You -- you say it's limited to testimonial statements. The -- the clause is limited to testimonial statements. However, it is not absolute.

MR. DREEBEN: That's correct.

QUESTION: Are there any other provisions that are in the Bill of Rights that are not absolute and can be overcome by proof that the -- that the overall purpose of the truth-serving function is -- is achieved? For example, the right to jury trial. Do -- do we approach that by saying, oh, in a really complicated case where a jury would impeded rather than facilitate the finding of truth like, you know, a Sherman Act case, yes, it says there's -- you're -- you're entitled to trial by jury, but the whole purpose of it is to achieve truth, and where that purpose wouldn't be served, let's forget about the jury? We don't say that, do we?

MR. DREEBEN: No, Justice Scalia, but --

QUESTION: Then why do we say it about the

Confrontation Clause? And that -- that's essentially the Government's argument, that --

MR. DREEBEN: The Court has said it about the Confrontation Clause --

QUESTION: I know it has.

MR. DREEBEN: -- in a variety of contexts.

QUESTION: And -- and the issue here is whether we -- we should retreat from those statements.

MR. DREEBEN: Well, starting from the overall structure of the Sixth Amendment, the Court has construed many of the rights in the Sixth Amendment not to be absolute in certain contexts. The jury trial right does not extend to all criminal prosecutions as the language of the Constitution would provide. It does not -- the right to counsel does not extend to every criminal case in which a -- arguably the text would require. The -- the Compulsory Process Clause has been held --

QUESTION: That -- that's just a matter of limiting the scope. The right to counsel. Do you have the right to counsel for, you know, at -- at every moment during -- during recesses in the trial and so forth? That's -- that's just a matter of the scope of it, not a matter of saying, yes, this is within the scope. This is testimonial, but we nonetheless will not follow the command of -- of the constitutional provision that the

accused is entitled to be confronted with the witnesses against him.

MR. DREEBEN: What this Court has said about the Confrontation Clause is that it incorporated a preexisting common law right that had common law exceptions with it, and those common law exceptions were capable of growing and being developed along the lines of analogous principles.

QUESTION: Growing and being developed so that the -- the guarantee of confrontation is just a guarantee that in the future we'll -- we'll leave it there if we think it should be there.

MR. DREEBEN: It's not an absolute guarantee. What helps to, I think, explain that is to look at what confrontation involves. It involves having a witness who's under oath, who is subject to cross-examination, who's demeanor can be observed by the jury, and who is brought face to face with the accused. Now, this Court has held in a number of cases that all or some of those components of confrontation may be dispensed with when, in the necessities of the case and in order to obtain witness -- witnesses who will be able to testify at the trial, it is required to do so.

For example, in the instance of former testimony, you have oath, cross -- and cross-examination,

and you have at one point the defendant face to face with the witness, but you do not have the important confrontation right of the jury having the opportunity to observe the demeanor of the witness. And the Court held that that is required because the necessities of the case require overcoming what would otherwise be a confrontation right.

Similarly in Maryland v. Craig, the Court held that the literal face-to-face right to confront the witness may be overcome by the necessities of the case.

QUESTION: But then maybe your position is not different from -- from theirs in this respect, if you take the law professors'. If you say, as you do in your brief, that it allows testimonial evidence in where the circumstances are such that they serve the same underlying purpose as the Confrontation Clause, then all you're saying is the same thing that they say here. Will the accused have had an adequate opportunity to confront the witness? In other words, like a -- a prior trial. Is that all you're saying? Because if that's so --

MR. DREEBEN: No. It's definitely not what we're saying, Justice Breyer.

QUESTION: No, it certainly isn't. You're -- you're defining the underlying purpose much more broadly than the law professors.

MR. DREEBEN: We define the underlying purpose of the Confrontation Clause --

QUESTION: To achieve the truth. And if there are other indicia --

QUESTION: Oh, achieve the truth.

QUESTION: Yes.

MR. DREEBEN: To serve the truth-seeking mission of the --

QUESTION: Sir Walter Raleigh -- if they came in -- Sir Walter Raleigh -- in fact, it is shown that all the -- the statements made out of court against Sir Walter Raleigh were made in front of 12 bishops, and at that time that was a very, very good security that this was completely true. Twelve bishops who saw the thing and -- and they, you know, go -- they say, absolutely accurate. In -- in your opinion, that would then come in in Sir Walter Raleigh's own case.

MR. DREEBEN: I doubt seriously that -- that Sir Walter Raleigh's case would come out differently under our approach. What we are talking about --

QUESTION: In other words, Sir Walter Raleigh -- it came out that they did introduce this thing. So you're saying if we take -- if we take --

MR. DREEBEN: The witnesses were available, Justice Breyer, in Walter Raleigh's case. And our

position on the availability of witnesses is that when they are available, they should be brought in.

QUESTION: You would overrule Inadi then?

MR. DREEBEN: Oh, definitely not, Mr. Chief Justice. Our view of Inadi is that the statements of co-conspirators made to each other out of court in connection with the -- with the conspiracy are almost invariably non-testimonial statements. There may be a few rare instances in which the co-conspirators are continuing the conspiracy and speaking to law enforcement, and in that context, in the unlikely event that the United States submitted that those statements were coming in for the truth of the matter asserted and not because they were false, then perhaps there would be some issue about our approach. But in the vast majority of cases --

QUESTION: Well, what about in this case? There's a co-conspirator's statement.

MR. DREEBEN: There was no suggestion in the lower courts that these two individuals were attempting to further the conspiracy or that there was a conspiracy going on at the time of the statements.

QUESTION: Well, I was going to say there was no conspiracy found, was there?

MR. DREEBEN: That's -- these -- these statements were admitted, Justice Souter and Justice

O'Connor, as statements against penal interest. And the basis for the State court decision in letting them in --

QUESTION: And not as a so-called interlocking -- well, it was an interlocking --

MR. DREEBEN: Yes. The -- the Confrontation Clause --

QUESTION: -- type of confession or something.

MR. DREEBEN: The hearsay basis was statement against penal interests. The confrontation argument that was accepted by the Washington Supreme Court was that the confession of Sylvia Crawford interlocked, which meant that it overlapped and paralleled the confession of Michael Crawford --

QUESTION: But the Government doesn't endorse that position, as I understand it.

MR. DREEBEN: We do not endorse that position, Justice Stevens.

QUESTION: What is your position as to what should have happened with this statement?

MR. DREEBEN: This statement should have been excluded, Justice Kennedy. It -- first of all, we think that under --

QUESTION: Under Roberts --

MR. DREEBEN: Under Roberts --

QUESTION: -- as well as --

MR. DREEBEN: That's correct.

QUESTION: -- this theory.

MR. DREEBEN: Under Roberts, as explicated in Idaho v. Wright, corroborating evidence that serves to show the reliability of a particular statement is not an acceptable means of vindicating its admission under the Confrontation Clause.

I can think of only two possible reasons why the confession of the defendant when it interlocks with the statement made out of court might be treated differently, and neither of those arguments seems to me to be valid.

One would be if, as a factual matter, the defendant's own statements showed that the out-of-court statement was reliable to a degree not found with any other corroborating evidence, and I don't think that that's --

QUESTION: Well, couldn't he be impeached with his out-of-court statement?

MR. DREEBEN: He certainly could and was impeached with his out-of-court statements.

And this brings me to the second reason, Chief Justice Rehnquist. The defendant can attack the reliability of his own out-of-court confession. He's not bound by some notion of estoppel that because he said it, therefore it must be true. And the record in this case

reflects that Michael Crawford attempted to present a self-defense at trial that was substantially more robust than the statements that he made at the time. And under Crane v. Kentucky, this Court has held that a defendant can attack the reliability of his own statements. So even if the statements did directly interlock, in the sense that the defendant's statements matched the out-of-court declarant's statements, that would not render them per se reliable for confrontation purposes.

QUESTION: But they didn't match, and that's the oddest thing. On the key thing, the most important to the defendant, he suggested that the -- the person he assaulted had reached for something before the assault. And her testimony -- or her statement is that it was only after the defendant assaulted the victim that the victim reached in -- in his pocket. I don't see how those could be said to interlock. They seem to clash with each other on the key point in the case.

MR. DREEBEN: And -- and the State made that point in its rebuttal argument. So there -- there is certainly ample basis for saying that under existing law the statements do not come in.

The question for the Court is should the Court revisit its Ohio v. Roberts jurisprudence because of the concerns about whether Ohio v. Roberts was

constitutionally accurate.

QUESTION: Well, concerns by whom?

MR. DREEBEN: Concerns that I think are -- are raised by reading the Confrontation Clause as an original matter before this Court's jurisprudence made all hearsay subject to the Confrontation Clause.

Now, we do not submit that there is a practical need for the Court to revise its jurisprudence. The United States has not encountered a significantly difficult burden in admitting evidence under the hearsay rules under the Roberts approach as -- as it has now been articulated. And we also acknowledge that the Court would have to develop a jurisprudence to decide what testimonial statements means, if the Court adopts the testimonial approach.

What we do submit is that the way in which the word witness against is used in the Sixth Amendment, particularly when read in light of the way the word witness is used in the Fifth Amendment and also in the Sixth Amendment's Compulsory Process Clause, that the word witness was meant to refer to people who were giving evidence for purposes of a case, not to people who simply happen to observe facts in the world and made statements about them and that are now being used as hearsay in a criminal trial.

QUESTION: Do you think that developing a jurisprudence to decide what constitutes testimonial statements is any more difficult than developing a jurisprudence to determine what are sufficient indicia of reliability to overcome the text of the Confrontation Clause?

MR. DREEBEN: No, Justice Scalia. I think they both involve certain challenges.

What exists today is a body of law that has examined the indicia of reliability question, and with respect to certain statements in the testimonial category, such as victim statements to the police in a condition that might be likened to an excited utterance or sometimes in statements in aid of medical diagnosis or treatment, and also true statements against penal interests such as guilty pleas by a defendant that does not implicate the defendant on trial but simply acknowledges criminal conduct, the lower courts have concluded that those statements do have sufficient indicia of reliability to be admitted.

And our concern is that if this Court were to adopt the testimonial approach, that it not do so in a way that would foreclose lower courts from taking advantage of evidence that is reliable, unavailable from another source, important in criminal prosecutions and well-

grounded in the theory of the Confrontation Clause as a vehicle for achieving truth in criminal trials.

QUESTION: Why unavailable from another source? Let's say you have this -- this self-incriminating confession, but the person is available. You could put him on the stand to test whether that confession that he made was true or false. Why -- where do you -- where do you pull this requirement that -- that he be unavailable from? If indeed it doesn't violate the Confrontation Clause because it's sufficiently reliable, why does he have to be unavailable?

MR. DREEBEN: Our position is that with respect to testimonial statements, the preference is to get live, in-court testimony with all of the benefits that the Confrontation Clause envisioned for testimony.

But sometimes a defendant who pleads guilty is still awaiting sentencing, and as this Court held in Mitchell v. United States, the defendant still has a Fifth Amendment privilege and can refuse to testify on grounds of privilege. Other defendants who plead guilty in their own cases will sometimes refuse to testify even on pain of contempt, and at that point the choice for the judicial system is either admitting that's -- that evidence in the criminal trial or excluding it altogether and risking a manifest failure of justice because there isn't the

evidence.

And I think it's important to distinguish between those kinds of statements, the excited utterances, 911 calls, true statements against penal interests that implicate only one --

QUESTION: Thank you, Mr. Dreeben.

MR. DREEBEN: Thank you --

QUESTION: Mr. Sherman, we'll hear from you.

ORAL ARGUMENT OF STEVEN C. SHERMAN

ON BEHALF OF THE RESPONDENT

MR. SHERMAN: Mr. Chief Justice, may it please the Court:

The State of Washington is asking the Court to -- I guess, to simply say -- excuse me -- retain the reliability framework of Ohio v. Roberts. Excuse me.

The -- the primary part of Ohio v. Roberts that's important to the State is the reliability factor, and the reason that -- that that's important is because essentially Ohio v. Roberts recognizes that there are other rights and interests at stake in a criminal trial other than the defendant's confrontation rights. For example, it recognizes that society as a whole has an interest in seeing that criminal activity is properly addressed.

QUESTION: We could have written it that way, I

suppose. I mean, the Confrontation Clause instead of saying in all criminal prosecutions, the accused shall enjoy the right to be confronted with the witnesses against him, we could have added, comma, unless there are other considerations.

MR. SHERMAN: That's correct --

QUESTION: It doesn't say that. It says in all criminal prosecutions, the accused shall enjoy the right to be confronted with the witnesses against him.

MR. SHERMAN: That -- that's correct, Your Honor. And when I --

QUESTION: Where -- I mean, I don't understand where we derive this permissibility of not allowing him to confront the witnesses against him so long as we come to the judgment that the evidence is inherently reliable.

MR. SHERMAN: Well, Your Honor, I guess to answer that question properly, I -- I'll speak to what I at least read and heard actually petitioner and in one of the amici briefs concerning the -- the history surrounding the Confrontation Clause and how we got to have the right to confrontation. And essentially what I -- I gleaned from that is there, at a point in time, was not a right to confrontation, and over the course of centuries, the right developed. But it appears to me that it developed based -- developed based upon really what public policy was,

that the -- the society would not tolerate the inequities of the systems that were in place that were denying confrontation and felt that it was fair that this concept of confrontation take place.

So when the -- the Framers of the Constitution put that right into the Bill of Rights, it was based upon, in my view, their perception that the public policy that their society at that time wanted to recognize and make everyone know that they're retaining that to be their right.

I don't think, though, that it would rationally follow that -- that they intended that everything that they said be written in stone and --

QUESTION: No. That may be --

QUESTION: It could be amended. It could be amended. I mean, you know, there's an amendment provision in the Constitution, but -- but until it's amended, it -- it does seem to say that in all criminal prosecutions, you -- you have the right to be confronted.

MR. SHERMAN: And I would agree. And in fact, I -- I think one of the points that -- that I -- I want to make is that a literal interpretation of the Confrontation Clause bars the petitioner's proposal and the proposal of amici and the proposal of the State to maintain the Roberts framework.

QUESTION: Why?

MR. SHERMAN: If you take literally the Confrontation Clause, I believe that it --

QUESTION: It says witnesses, confront witnesses. A witness is a person who testifies and I don't see any literal problem there.

MR. SHERMAN: I -- I believe that everyone that comes and sits on the witness stand and says anything that is going to be used --

QUESTION: A typical case that -- where it should come in, but I guess under their proposal it would, and under the status quo it probably wouldn't. We have a case of drug conspiracy. During the conspiracy, well before anybody is caught, they discover, through whatever means, that there's a cup on the mantel, a pewter cup, that's filled with drugs. Who does it belong to? Does it belong to the defendant? We have a witness who overheard the defendant's wife shout out from the kitchen, Dink, have you got your pewter cup? It's on the mantel. All right? Does that come in or not come in? Whether it does or not, it's not a Confrontation Clause question.

You say that we should make that into a constitutional question. We should have all the constitutional courts going into it or not?

MR. SHERMAN: Well, I -- I respectfully disagree

with Your Honor --

QUESTION: Why?

MR. SHERMAN: -- that it's not a Confrontation Clause question.

QUESTION: All right. You say it is. In other words, every time that a -- that a -- a trial in any one of 50 million trials in the United States decides to admit some hearsay, in principle, you go into habeas and the Federal judge has to decide whether that hearsay is or is not, quote, reliable, end quote, for purposes of the Confrontation Clause. That's the present system.

So you're the prosecuting attorney. Correct?

MR. SHERMAN: Correct.

QUESTION: You have experience in this area. Tell me if this is right.

What I would expect to have happen is that all these habeas courts, when they get real hearsay, nothing to do with the trial, you know, real hearsay like I just talked to you about, they'll find it reliable if the -- if the -- if the State court admitted it.

Then, however, they get to this kind of a case where the police were actually there writing out affidavits which they're going to introduce, and there what they'll say is, no, it's not reliable.

So in order to make the Roberts system work,

what will happen is you have to have two ideas of reliability. Now, has that been a problem or am I just making that up? Because what they're saying is the Roberts thing makes no sense. If you take it seriously, it keeps out stuff that should come in and it lets in stuff that should stay out. And if you don't take it seriously, which is what must have happened, it just produces a mess.

MR. SHERMAN: To address the first part of your question, Your Honor, I believe what I was -- was attempting to say was that the Confrontation Clause, strictly interpreted, it is going to not let any hearsay of any kind in. Yes, that is my position.

QUESTION: You mean the -- the only kind of evidence that can become -- come in at a criminal trial is from a witness who's physically present in the courtroom.

MR. SHERMAN: I believe that that would be a strict interpretation of the Confrontation Clause, Your Honor.

To answer the second part of -- of your question --

QUESTION: From your own experience. I'm quite interested actually, if -- if you followed what I was saying.

MR. SHERMAN: Well, actually --

QUESTION: You work in this area and I'd like you --

MR. SHERMAN: I do and -- and I can say from my experience, I have had very few problems arise with Confrontation Clause principles under the Roberts framework. And -- and as a matter of fact, in 12 years of practice, this is the first time I've ever seen -- I've seen an interlocking confession come up.

But I think that the reason that --

QUESTION: Do you think this was interlocking?

MR. SHERMAN: I do, Your Honor.

QUESTION: Well, they certainly differed on a key element. I'm not sure it would come in under Roberts.

MR. SHERMAN: And, Your Honor, I -- I believe that the court of appeals also, at least the majority of that court, believed that there was a difference between what the -- Mr. and Mrs. Crawford were saying, but the -- our supreme court looked more closely at the statements and observed that in fact they were saying the same thing.

QUESTION: Wasn't the whole point of admitting it that -- that she had, in effect, said there -- there was no weapon, the victim was not taking a weapon out, and that was on the basis of her statement the prosecutor made exactly that argument? Wasn't that why it came in?

MR. SHERMAN: No, not specifically that -- that

she said that he wasn't taking one out because clearly she didn't say that. And if in fact that was the --

QUESTION: Well, her description did not include one. And -- and wasn't that the basis of the prosecutor's argument, that this wasn't self-defense?

MR. SHERMAN: In part, and -- and -- but his description did not include a -- a weapon either. Both of their descriptions --

QUESTION: No, but the implication of his description was that he reasonably thought something was coming out and he then in one of his statements said, you know, it was him or me. And the reason her statement was admitted was that it was not congruent with that, that there was no indication in her statement that a -- that a -- a weapon was being withdrawn. So at the -- I -- isn't -- isn't that the reason that the statement, for the purpose it was admitted, was not interlocking?

MR. SHERMAN: I believe that that was that prosecutor's interpretation of -- of that evidence, and that is in fact what he argued at trial. I think he was incorrect. I think that if you look at the statement, it very -- Sylvia Crawford very clearly says that -- that the victim appeared that he was reaching for something in his pocket.

QUESTION: After the assault.

MR. SHERMAN: No, Your Honor, I respectfully --

QUESTION: Why don't we look at this since the testimony is there? I read it that way.

MR. SHERMAN: And -- and, Your Honor, as I indicated, so did apparently my deputy prosecutor and so did our court of appeals. Our -- our supreme court read it as -- as I am.

QUESTION: But one of the worrisome things about treating all these things is just hearsay reliability. I don't understand how this testimony comes in. When the woman testified -- when the woman said in her statement I was drunk, I closed my eyes, how could that possibly be reliable?

MR. SHERMAN: Well, she did say those things, but she also said things that indicated that that was not quite -- quite correct. She also said, well, I saw certain things going. I saw Michael stab the victim. I saw the victim doing these --

QUESTION: But she said at that time she had been drinking and she -- that happened before. I just don't understand this reliability test that allows something to come in that doesn't coincide with what the defendant himself said, and that the declarant is saying, oh, I was scared. I closed my eyes.

MR. SHERMAN: Well, and -- and I understand Your

Honor's question and -- and position. One of the things that obviously you can't get out of the flat piece of paper is -- is what her true condition was, and that is a problem. But I don't recall her saying specifically that she was drunk at the -- at the time, merely that she had been drinking and she indicated that Michael had been drinking as well. But I don't know that --

QUESTION: She did say that she shut her eyes and didn't really watch. Those were her words. I shut my eyes and didn't really watch. How could such testimony be reliable?

MR. SHERMAN: Well, because she at the same -- in the same breath was able to accurately describe the same events that Michael had described in his statement.

QUESTION: But that's unreliable. I mean, you have a witness who says two -- two opposite things. I saw this, and on the other hand, I shut my eyes.

MR. SHERMAN: And -- and I understand Your Honor's position on that. I -- I just respectfully disagree. I don't think that those factors by themselves necessarily render it to be unreliable.

QUESTION: May I ask --

QUESTION: But suppose we said it was unreliable. Let's suppose we held that. And in this case it goes out. All right. Now, so we've had a pretty tough

standard in your view of what counts as reliable and not. It's been a pretty tough standard. It has to be really reliable.

MR. SHERMAN: Right.

QUESTION: Okay. Now, what's going to happen when the courts, the Federal courts or the State courts, apply that tough standard of reliability to hearsay statements that have to do with the -- involved in the commissions of the crime itself? In other words, not -- not when they're in the police station giving confessions, but like the example I gave you with the cup.

Now, suppose we apply the tough standard of reliability to those. Would that make a difference? Would they then start to be kept out because they violate the Confrontation Clause?

MR. SHERMAN: I think at -- at a certain point the tougher you make the standards for hearsay to come in, the fewer pieces of hearsay that are going to come in. I don't think that that's necessary in this case because what -- if -- if we're simply talking about interlocking confessions and whether such a thing exists and if they -- as the question presents, if there will ever be such a thing as a confession that sufficiently interlocks so that it will be sufficiently reliable to be admitted or not, the Court could simply say there's just never going to be

a situation that comes before us where they will interlock sufficiently and -- and be admittable -- admitted.

QUESTION: Mr. Sherman, on this question of interlock, I know we've referred to interlock in Bruton cases where they've got joint trials of the defendants and that sort of thing. What is the strongest case you have for the proposition that absent a joint trial, the interlocking nature of a confession -- or a statement is critical?

MR. SHERMAN: I think it would be this case that's before the Court today, Your Honor.

QUESTION: I see. So none of our precedents support that proposition.

MR. SHERMAN: I think actually the only time this Court has addressed the interlock theory on its merits --

QUESTION: Is in the Bruton-type --

MR. SHERMAN: -- was in Lee v. Illinois when it was simply the issue of the interlocking confession and there wasn't any side issues of co-defendants in the same trial or any of those other issues.

QUESTION: But -- but we have said in other cases that the reliability, which -- which Roberts insists upon, has to be established from the statement itself and not from other statements. Right?

QUESTION: Which would seem to exclude interlock --

QUESTION: Interlocking confessions. That's the problem I have with it. We -- we haven't had such a case, but the standard that we expressed in Roberts would seem to exclude interlocking confessions as establishing reliability.

MR. SHERMAN: And if Roberts were the only case that -- that the Court were to look at, that I think would -- I would agree that would be the case. But in Lee v. Illinois, I think this Court very clearly accepted -- interpreted the concept of interlocking confessions, and thereafter in Cruz v. New York. But in Lee, the Court actually set forth a test to be used -- at least in Earnest v. New Mexico, the Court called it a test -- but a test to be used in determining when an interlocking confession can be admitted. Now, that followed Roberts.

QUESTION: But wasn't that a joint trial? I can't remember for sure.

MR. SHERMAN: I don't believe that Lee was a joint trial, Your Honor. In fact, I think in -- Lee was a case in which the Court -- this Court determined that the confessions did not sufficiently interlock to make them reliable to be admitted, and also there was --

QUESTION: I thought Lee involved co-

defendants.

MR. SHERMAN: Well, I -- I believe there -- I don't -- I don't recall there being co-defendants at trial, and I may be mistaken about that. My recollection is that the -- the two holdings of Lee were, one, that -- that they couldn't be corroborated by other evidence; and two, that the confessions simply weren't sufficiently interlocking. And I may be mistaken. I just -- I'm not recalling there being co-defendants tried at the same time in that particular case.

But my point being that Lee, of course, came after Roberts and, in my mind, established a third way of -- third form of -- of determining reliability that was separate from what was in Roberts. Roberts had your indicia of reliability and your well-founded hearsay exception, and then in Lee it's my perception that this Court formed a third test, that being the interlocking confession rule test, and that --

QUESTION: But the bottom line was that it -- that that test was not met in the case, that there wasn't a sufficient interlock.

MR. SHERMAN: That -- that wasn't met in the Lee case, and that was the decision of the court of appeals in this case. And it was our supreme court that reversed that and said, no, we believe that they did sufficiently

interlock.

QUESTION: I thought that what we said in Lee was simply that assuming that an interlocking confession exception exists, this didn't meet it. I -- I don't know that we -- that -- that we spoke as though there was such an exception. We just said assuming it does exist, the facts here don't -- don't meet it. Isn't that what the case held?

MR. SHERMAN: I think perhaps. I -- I know that in the very least the Washington State Supreme Court interpreted it to be a test, and I know that in Earnest v. New Mexico, this Court called it a test for determining when interlocking confessions can come in. So taking it from both of those cases, the Washington Supreme Court in the very least determined that it was a test, and in fact, in I believe it's State v. Rice said we adopt this new test from -- from Lee v. Illinois as to interlocking confessions.

QUESTION: I thought actually that there were five members of the Court in Lee v. Illinois to say that confessions of a co-defendant are presumptively unreliable for purposes of Roberts.

MR. SHERMAN: Correct, Your Honor.

QUESTION: And that even if there was a so-called interlocking confession exception, it wasn't met in

that case.

MR. SHERMAN: And -- and I can understand that interpretation. I -- it just -- I'm -- I'm certain that it's not the interpretation that the Washington State Supreme Court made, and in fact, most courts --

QUESTION: Well, maybe they better re-read it.

(Laughter.)

MR. SHERMAN: That's entirely possible, Your Honor, and I'm certain that after today, they will -- they will do so.

(Laughter.)

MR. SHERMAN: The point -- but the point being that if there is not an interlocking confession rule, then there is not. If this Court says we -- there will never be a situation where one co-defendant's confession, regardless of how identical it is to the defendant's, will ever be reliable enough, then so be it. Then we'll have that test. It will be straightforward and can be applied accordingly.

That, in all candor, is the lesser of the State's concerns in this coming -- in this case coming before this Court today, the primary concern of the State actually being that this Court retain the reliability standard of -- of State -- of Ohio v. Roberts for a variety of reasons that relate essentially to, as I

indicated earlier, this underlying recognition that there are simply other interests at stake other than the defendant's that really need to be addressed.

QUESTION: Why should the Court retain it when this very case gives us an example of how arbitrary that determination is made whether it's reliable? When a court can call something -- a witness -- a declarant in the shape this one was and say that's reliable, shouldn't that make us worry about using that test?

MR. SHERMAN: Well, I have to say that I don't think this Court or any court can make a test that is not going to have some problems, and in fact, both the petitioner and the learned professors admit that their system have -- has problems too. Any system is going to have problems. The bugs are going to have to be worked out. It'll take years of -- of cases, and the -- and the reality is -- and I, of course, mean no disrespect to any judge -- anytime you get -- you have a judge making a discretionary decision, on the same set of facts there's simply going to be some judges that will make exactly opposite decisions based upon the same set of facts. That's just human nature.

In this case -- and the point that I'm trying to make is that Ohio v. Roberts is a known quantity, it's a known entity. I haven't experienced any problems with its

application personally or in cases that have been addressed at my office since I've been there. A new system that is proposed by the petitioner and the amici simply fails to take into consideration, as this Court did in Ohio v. Roberts, that there are other rights and other interests that are involved in a criminal case. It doesn't address problems concerning witnesses that become unavailable through no fault of the State. Yet, why should society suffer to have a criminal defendant released simply because a witness has become unavailable?

And you know, you can't always prove a defendant has made a witness unavailable. That is a really tough standard.

There are similar other cases where particularly young witnesses, who are perfectly capable of telling you exactly what happened to them or what they've seen in a nonconfrontational setting, but yet, because of either fear or intimidation, they are simply unable to come into court and testify in front of a bunch of strangers or in -- probably in front of the very person who is alleged to have victimized them. They're not going to be able to say a thing. Yet, there needs to be some way to get what they can say in front of a jury. I -- I think that any system that prohibits that is just going to be contrary to the interests of society in general and to the interests of

the other parties that -- that are involved in the trial other than the defendant.

And if there are no further questions, thank you very much.

QUESTION: Thank you, Mr. Sherman.

Mr. Fisher, you have 3 minutes remaining.

REBUTTAL ARGUMENT OF JEFFREY L. FISHER

ON BEHALF OF THE PETITIONER

MR. FISHER: Thank you, Your Honor.

I think it's important to concentrate in rebuttal on the State's suggestion and the Solicitor General's suggestion to retain the reliability prong of the Roberts framework.

The Solicitor General agrees with us that the history of the -- that -- that you ought to be looking to history here, and the history on this point is crystal clear. From Rex v. -- Rex v. Paine in 1696, other English cases before the Constitution, and then this Court's cases after the Constitution was adopted, principally Kirby and Mattox, and all the way through Douglas, the -- when the situation arose that a witness was unavailable, the rule was clear if the -- if -- if the statement was testimonial, given to the authorities, it had to be excluded. And it's not -- and the -- and the balance was struck by the Framers not -- not just because of these

public policy considerations, but because of the Framers were insisting upon an adversarial method of giving testimony. And when the Framers decided, when that was not present, that we were simply not prepared to -- to admit the testimony.

And so what we have is we have a clear rule until at least the 1970's that reliability doesn't matter. And the only time reliability -- first was adopted by this Court. The only time it became important was in Dutton v. Evans when you had a non-testimonial statement, and then in Roberts when this Court created a general framework that it allowed reliability, all of a sudden, be into play when we were stretching the Confrontation Clause in our view too far.

But once you bring the Confrontation Clause back to the proper scope, as we're asking you to do and the Solicitor General is asking you to do, there's really no reason anymore to -- to keep the reliability prong. The reliability prong was -- was adopted by this Court to deal with the problem of hearsay that was coming outside the testimonial type setting. Once you -- once you read it -- read that problem away, we're back to the original understanding of the Confrontation Clause.

And the reason that you ought to stick with that -- Justice Ginsburg I think put the nail on the head when

she said the reason we're here today is that you have a -- you -- you have -- what you have now is a system where trial judges can reach almost any conclusion they want. That's shown in our briefs. The Solicitor General doesn't even describe to you how reliability -- doesn't even defend reliability findings in light of all the briefing by -- by the petitioner and by amici.

And so I think that when you look at that, you show that the very concern that gave rise to Raleigh trial -- and I would say parenthetically that I believe Lord Cobham was unavailable in the trial. That's what the transcript says. And the very problem was that trial judges could do these reliability determinations in place of -- of a clear rule of when testimony could be given.

Thank you, Mr. Chief Justice.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Fisher.

The case is submitted.

(Whereupon, at 11:56 a.m., the case in the above-entitled matter was submitted.)